In the Supreme Court of the United States

OCTOBER TERM 1976-77

No. 76-1291

IDAHO DEPARTMENT OF EMPLOYMENT
Petitioner

vs.

MARLENE G. SMITH
Respondent pro se

PETITION FOR WRIT OF CERTIORARI TO THE IDAHO SUPREME COURT

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Idaho Department of Employment, prays that a writ of certiorari issue to review the judgment of the Idaho Supreme Court entered December 23, 1976, upholding Respondent's claim that, under the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution, she be eligible for unemployment compensation benefits.

OPINION BELOW

The opinion of the Idaho Supreme Court entitled *Marlene G. Smith v. Department of Employment*, No. 12172, 557 P.2d 637 (1976), is printed in the Appendix hereto. No request for rehearing or extension of time was made.

JURISDICTION

The final judgment of the Idaho Supreme Court, the highest applicable state court, was entered on December 23, 1976. This Court has jurisdiction under U.S.C.A. 1257(3), "where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States . . ."

Rule 19(1)(a) found in 28 U.S.C.A. Supreme Court Rules, is pertinent where a state court has decided a case "in a way probably not in accord with applicable decisions" of the Supreme Court.

QUESTION PRESENTED

Whether Idaho Code Section 72-1312(a), which declares "that no person shall be deemed to be unemployed while he is attending a regular established school excluding night school . . ." is unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, in that it distinguishes between day and night students in determining eligibility for unemployment compensation benefits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

COMPENSABLE WEEK. – (a) A week of unemployment with respect to which an eligible benefit claimant shall be entitled to benefits shall be known as a compensable week; provided, however, that no person shall be deemed to be unemployed while he is attending a regular established school excluding night school, except where he has been assigned to a refresher or special training course by the director.

11A Idaho Code Section 72-1312(a) p. 255

PERSONAL ELIGIBILITY CONDITIONS. – The personal eligibility conditions of a benefit claimant are that –

(d) During the whole of any week with respect to which he claims benefits or credit to his waiting period he was able to work, available for suitable work, and seeking work; provided, however, the director shall waive these provisions for each week he is attending training under the provisions of Section 72-1312(a).

11A Idaho Code Section 72-1366(d) p. 309

Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Fourteenth Amendment to the
United States Constitution

STATEMENT OF THE CASE

Respondent had been a retail-clerk in a Boise, Idaho, department store for several years when she ceased working there in November, 1974. Respondent, a junior in college, had occasionally enrolled in night school at Boise State University with the expressed desire of obtaining an economics degree with an accounting background. She continued taking night courses during the spring of 1975, and also obtained a clerical job in Garden City, Idaho, for a few weeks, whereupon she again became unemployed.

She was declared eligible for unemployment insurance benefits on April 27, 1975. She received weekly benefit checks until mid-June, 1975, when she enrolled in summer school. She felt that her Monday through Friday classes from 7:00 a.m. to 9:00 a.m. would not affect her availability to obtain suitable employment in that most department store clerk jobs generally commence after 9:00 a.m. The Idaho Department of Employment, however, determined that she was ineligible for unemployment insurance benefits pursuant to Section 72-1312(a), Idaho Code, because she was attending a "regular established school excluding night school" and, hence, was presumed to be not unemployed. This determination was

upheld by a redeterminations examiner on June 15, 1975, and was affirmed by an appeals examiner on August 15, 1975. The claimant appealed this matter to the Idaho Industrial Commission which reversed the three prior decisions. Petitioner appealed the Industrial Commission's reversal to the Idaho Supreme Court. In a final decision rendered by this highest Idaho State appellate body, the claimant was held eligible for benefits. This was so, allegedly, because a denial of unemployment compensation to day-time students, while granting them to some unemployed workers enrolled in night school who were able, availabl and seeking suitable work, was an alleged violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Petitioner admitted to the Idaho Supreme Court that there was a potential argument for discrimination in granting benefits to one group of persons attending school while at the same time denying them to other persons. It was argued, however, that this was a decision for the legislature and not for the courts and that fine distinctions such as this and line drawing were primarily within the scope of duty of the legislative body. In this area of social and welfare legislation, it was argued by petitioner that the legislature, when disbursing public funds derived solely from employer contributions, could conclude that night students were more attached to the labor market than were day students in that night students were available for full-time day work.

The Idaho legislature had obviously concluded that attending school during the day restricted the availability of the worker to accept most full-time jobs. The legislature, therefore, presumed that generally those who worked during the day and went to school at night were primarily workers and only secondarily students. Whereas, according to the legislature, those who were only available to work after attending school during the day were primarily students and were not to be considered as unemployed workers eligible for unemployment compensation.

The claimant, although previously employed beginning at 9:30 a.m., had applied at many establishments which would typically work an 8:00 a.m. to 5:00 p.m. day. She was also not restricting her work search to retail-clerk jobs, but rather had also sought a bookkeeper-key position. She had an accounting and economics background and had attended the Links Business School in Boise for a time. She was obviously not restricted to clerk-type employment in a department store, but would be expected to seek a variety of positions in many different establishments. This she did, although without apparent success. She subsequently decided to enroll at Boise State University to complete her last two years of Economics and Accounting study in the equivalent status of full-time student carrying a load of 10 semester hours.

The Idaho Supreme Court declared that their holding in a similar case, *Kerr v. Department of Employment*, 97 Idaho 385, 545 P.2d 473 (1976), mandated that a denial of benefits violated claimant's constitutional rights to "equal protection." The claimant, pro se, originally agrued that it was unfair for her to be denied benefits because she was going to school during the day. She cited no constitutional provision, but it was implicit in her argument that she felt she was being denied "equal protection" under the Constitution of the United States. Petitioners argued in their brief and in oral argument before the Idaho Supreme Court that there was no denial of "equal protection" because no fundamental rights were infringed nor was any suspect classification involved.

Petitioners also urged that the Idaho Supreme Court case of *Swanson v. Employment Security Agency*, 81 Idaho 385, 342 P.2d 715 (1959), be considered in that a person attending a "regularly established school excluding night school" was conclusively presumed to be ineligible for unemployment compensation. This case, although not referred to in the more recent *Kerr* case, supra, was specifically disavowed as not controlling the disposition of Respondent's case.

As the Supreme Court recently stated in *Massachusetts v. Murgia*, 427 U.S. 307, 312, 314, 76 S.Ct. 2562, 2566, 2567, 49

L.Ed. 2d 520, 525-527 (1976), "equal protection analysis requires strict scrutiny of a legislative classification only when the classification impermissably interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class... This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one... Such action of the legislature is presumed to be valid."

The *Mattews v. DeCastro* _____ U.S. _____ 97 S.Ct. 431, 434, 50 L.Ed. 2d 389, 394 (1976) case is instructive for the case at bar and cites the well-known "reasonable basis" test for "an assessment of any constitutional challenge to a law providing for governmental payments of monetary benefits..." citing the famous *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153, 1161, 25 L.Ed.2d 471 and *Jefferson v. Hackney*, 406 U.S. 535, 546-547, 92 S.Ct. 1724, 1731, 32 L.Ed.2d 285 tests as follows: "Governmental decisions to spend money to improve the general public welfare in one way and not another are not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment... In enacting legislation of this kind a government does not deny equal protection merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality...' To be sure, the standard by which legislation such as this must be judged 'is not a toothless one,' but the challenged statute is entitled to a strong presumption of constitutionality 'so long as the judgments are rational, and not invidious, the legislature's efforts to tackle the problems of the poor are not subject to a constitutional straightjacket.'" It is further noted that "the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations..." in areas of social and economic welfare legislation. See *New Orleans v.*

Dukes, 427 U.S. 297, 303 96 S.Ct. 2513, 2517, 49 L.Ed.2d 511, 517 (1976).

It has become accepted that "consistently with the Equal Protection Clause, a State 'may take a step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind... the legislature may select one phase of one field and apply a remedy there, neglecting the others...' *Williams v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed.2d 563 (1955), 'The Equal Protection Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all.'" *Dandridge v. Williams*, supra, as cited in *Gedulig v. Aiello*, 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256 (1974).

Administrative convenience, although not controlling, is important in this matter. It is much simpler, thus less costly, to presume Respondent was ineligible for unemployment compensation because of her full-time attendance at school during the day than it is to make individual determinations as to whether the person is able, available and seeking suitable work. As in *Weinberger v. Salfi*, 422 U.S. 749, 785, 95 S.Ct. 2457, 2476, 45 L.Ed.2d 522, 550 (1975), "The Constitution does not preclude such policy choices as a price for conducting programs for the distribution of social insurance benefits." The *Weinberger* case, supra, is also instructive in the matter of determining the constitutionality of conclusive presumptions.

Whether there is a conclusive or only an irrebutable presumption in the instant case is hard to determine. However, as *Lavine v. Milne*, 424 U.S. 577, 583, 584, 96 S.Ct. 1010, 1014, 47 L.Ed.2d 249, 254, 255 (1976), points out, the "normal assumption" is that the applicant for welfare benefits must prove "his eligibility" and comply with the "host of requirements" imposed upon recipients of any "welfare scheme."

If the Idaho Supreme Court's decision is allowed to stand, this would work a considerable economic and administrative burden to the State of Idaho and its unemployment

compensation program. The Supreme Court stated in *Matthews v. Eldridge*, 424 U.S. 317, 348, 96 S.Ct. 893, 909, 47 L.Ed.2d 18, 41 (1976), that "the Government's interest, and hence that of the public, in conserving scarce fiscal and administrative resources, is a factor that must be weighed." Administrative convenience and cost admittedly are not so compelling as to outweigh the need for rational legislative classifications. They should, however, be considered as important, particularly in the absence of fundamental rights and suspect classification considerations.

REASONS FOR GRANTING WRIT

The Idaho legislature has reasonably determined that not all claimants of unemployment insurance should be granted benefits. They have established certain minimal requirements for proving eligibility for benefits among which are that a claimant must be able, available and seeking work and is not deemed to be unemployed if he or she is pursuing course work in a regularly established school, excluding night school.

There are in this case obviously no fundamental rights such as voting or travel involved. No mention of suspect classifications involving race, national origin or alienage has been advanced. For this reason, a relaxed standard of equal protection analysis should apply in this area wherein numerous unemployed workers and others are attempting to obtain noncontractual benefits from the public treasury.

Jucicial bodies should not proscribe line drawing in areas peculiarly within the mandate and expertise of the legislative branch of government. The unemployment compensation system in Idaho is not perfect nor is it necessarily the best or only possible method of administering this social welfare program. The important question is not whether another method might be more practical or less discriminatory, according to its critics or the courts. The main issue is whether the Constitution of the United States prohibits the Idaho legislature from distinguishing between what they consider to be full-time workers and only part-time workers who are

day-time students and granting benefits to one group and denying benefits to the other.

CONCLUSION

Because the decision of the Idaho Supreme Court was not in accord with applicable Supreme Court decisions, a writ of certiorari should be granted to review said decision.

March 16, 1977

Respectfully submitted,

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APPENDIX

I. *Marlene G. Smith v. Department of Employment*
No. 12172, 557 P.2d 637 (1976)

II. *Kerr v. Department of Employment*
97 Idaho 385, 545 P.2d 473 (1976)

III. *Swanson v. Employment Security Agency*
81 Idaho 385, 342 P.2d 715 (1959)

IV. *Marlene G. Smith, Claimant*
Decision of Appeals Examiner, No. 49-76,
August 15, 1975

V. *Marlene G. Smith, Claimant, vs. Department of Employment*
Idaho Industrial Commission, DOE 49-76
February 9, 1976

APPENDIX I

SMITH v. DEPARTMENT OF EMPLOYMENT
Cite as 557 P.2d 637

MARLENE G. SMITH, Claimant-Respondent
v.
DEPARTMENT OF EMPLOYMENT
Defendant-Appellant.

No. 12172

Supreme Court of Idaho
Dec. 23, 1976

An unemployed retail clerk appealed from a decision of the Industrial Commission denying unemployment compensation benefits on the ground that claimant was taking early morning college classes and was therefore unavailable for work. The Supreme Court, Bakes, J., held that so long as an unemployment compensation claimant meets all other relevant statutory requirements for eligibility, benefits may not be denied on ground that claimant attended school during daytime hours rather than nightime hours.

Affirmed.

Social Security and Public Welfare (Key 502)

Where unemployed retail clerk established that attendance at college classes would not have interfered with her employment in her usual occupation, since such classes ended before regular hours for department store clerks, unemployment compensation benefits could not be denied on basis that she was unavailable for work and was attending school during daytime hours rather than nighttime hours. I.C. Sections 72-1312(a), 72-1366, 72-1366(d), 72-1368(i); Const. art. 5, Section 9.

Wayne L. Kidwell, Atty. Gen., Roger B. Madsen, Asst. Atty. Gen., Boise for appellant.

Marlene G. Smith, pro se.

BAKES, Justice.

These proceedings were initiated by a claim for unemployment compensation benefits. The claimant respondent Marlene G. Smith had worked for several years as a retail clerk in a Boise department store before losing her job through no fault of her own in the spring of 1975. While she had been employed as a retail clerk, she had taken evening classes at Boise State University. After Smith became unemployed, she enrolled for classes in the 1975 summer semester at Boise State. For the first half of the summer semester, she attended class from 7:00 to 9:00 a.m. five days a week; for the second half, she attended class from 7:00 to 8:30 a.m. five days a week. The Department of Employment denied her unemployment compensation benefits for the weeks in which she was attending these early morning classes.

Smith appealed the Department of Employment's denial of benefits to the Industrial Commission. At the hearings before the Industrial Commission and its claims examiner, Smith testified, based upon her experience as a retail clerk, that employment as a department store clerk did not normally begin before 9:30 a.m., so the summer classes she had taken had not affected her availability for work as a retail clerk. No evidence was introduced to rebut this testimony. The Industrial Commission found that Smith was available for work during the weeks that she had taken summer classes and based upon this finding and our decision in *Kerr v. Department of Employment*, 97 Idaho 385, 545 P.2d 473 (1976), awarded her unemployment compensation benefits for those weeks. The Department of Employment appealed to this Court.

The Department argues that I.C. Section 72-1312(a) makes Smith ineligible for unemployment compensation benefits because it provides the following:

> "(N)o person shall be deemed to be unemployed while he is attending a regular established school excluding night school . . ."

However, in *Kerr v. Department, supra*, this Court said:

> "We conclude that I.C. Section 72-1312(a)'s definition of a compensable week, to the extent that it attempts to distinguish between day and night students in determining eligibility for unemployment compensation benefits, is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." 97 Idaho at 385-386, 545 P.2d at 473-374.

The Department acknowledges this decision, but argues that *Kerr* is not controlling. We disagree. So long as a claimant meets all the other relevant statutory requirements for eligibility for unemployment compensation, such as those set forth in I.C. Section 72-1366, our holding in *Kerr* prohibits denial of compensation on the ground that the claimant attended school during daytime hours rather than nighttime hours. We disavow any language in *Swanson v. Employment Security Agency*, 81 Idaho 385, 342 P.2d 714 (1959), which requires a contrary result, particularly the language creating the so-called "conclusive presumption." *Id.*, at 393, 342 P.2d 714.

In this case the Industrial Commission found that Smith's class attendance would not have interfered with employment in her usual occupation and had not affected her availability for full time work. That finding was supported by the evidence and is affirmed. I.C. Section 72-1368(i); Idaho Constitution, Art. 5, Section 9. Therefore, Smith met I.C. Section 72-1366(d)'s eligibility requirement of being "able to work, available for suitable work, and seeking work," and was entitled to benefits.

Judgment affirmed. Costs to respondent.

McFADDEN, C. J., and DONALDSON, SHEPARD and BISTLINE, JJ., concur.

APPENDIX II

KERR v. DEPARTMENT OF EMPLOYMENT

Cite as 545 P.2d 473

97 Idaho 385

RONALD K. KERR, Claimant-Appellant
v.
DEPARTMENT OF EMPLOYMENT
Defendant-Respondent

No. 11854

Supreme Court of Idaho
Feb. 3, 1976

Claimant appealed from determination of Industrial Commission denying his application for unemployment insurance benefits. The Supreme Court, Bakes, J., held that denial of benefits to claimant on basis of statute which rendered day students per se ineligible, but allowed benefits to night students, was violation of claimant's right to equal protection; and that claimant was entitled to unemployment insurance benefits and to reasonable attorney's fees incurred in challenging constitutionality of statute.

Reversed and remanded, with directions.

1. Constitutional Law [Key 253(2)]

In area of social welfare legislation, if classification has not been drawn upon traditionally suspect lines such as race, religion, or sex, such classification does not offend due process clause of Fourteenth Amendment if classification bears rational or reasonable relation to purposes for which statute was enacted. U.S.C.A. Const. Amend. 14.

2. Constitutional Law [Key 242.3(3L, 253(2)]
Social Security and Public Welfare [Key 260]

Where claimant for unemployment insurance benefits had been employed full time as assistant manager of coffee shop,

regularly working 50 to 60 hours per week, beginning his work day at noon, and attended morning classes at state university, denial of benefits to such claimant who was otherwise eligible on basis of statutory provision that only night school students could be deemed unemployed constituted arbitrary classification which bore no rational relation to purposes for which statute was enacted, and thus distinction drawn between night and day students violated Fourteenth Amendment due process and equal protection provisions. U.S.C.A. Const. Amend. 14; I.C. Section 72-1312(a).

3. Constitutional Law [Key 242.3(3)]
Social Security and Public Welfare [Key 622]

Where claimant was denied unemployment compensation because he attended college in mornings, while students who attended college in evenings were eligible for unemployment benefits, denial of benefits was violation of claimant's right to equal protection under law, and claimant was entitled to benefits and reasonable attorney's fees incurred in raising his constitutional challenge. U.S.C.A. Const. Amend. 14; I.C. Section 72-1312(a).

Dennis L. Cain, of Sallaz, Scanlan & Beer, Boise, for claimant-appellant.

R. LaVar Marsh, Asst. Atty. Gen., Boise, for defendant-respondent.

BAKES, Justice.

In this appeal we must consider the constitutionality of portions of the following provision of Idaho's employment security law, I.C. Section 72-1301 *et seq.*:

> "72-1312. COMPENSABLE WEEK. – (a) A week of unemployment with respect to which an eligible benefit claimant shall be entitled to benefits shall be known as a compensable week; provided, however, that no person shall be deemed to be unemployed while he is attending a regular established school excluding night school, except where he has been assigned to a refresher or special training course by the director."

Under the authority of I.S. Section 72-1312(a), the Industrial Commission denied the claimant appellant Ronald K. Kerr's claim for unemployment insurance benefits because Kerr was attending morning classes at Boise State University during the weeks for which he sought benefits. We conclude that I.C. Section 72-1312(a)'s definition of a compensable week, to the extent that it attempts to distinguish between day and night students in determining eligibility for unemployment compensation benefits, is in violation of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.

In 1970, four years preceding his claim for unemployment insurance benefits, claimant Ronald K. Kerr became employed full time as an assistant manager at the coffee shop, dining room and airline catering facilities at the Boise Municipal Airport. During this time Kerr's workday regularly began at noon and extended into the evening. He customarily worked between 50 and 60 hours per week. Kerr testified that it was normal in the food service business for a person in his position to work afternoons and evenings and have mornings free.

In the fall of 1971, Kerr began taking morning classes in a business course at Boise State University. He continued taking morning classes the following semesters and was taking morning classes during the summer semester of 1974. That summer the operator of the restaurant was changed and the new management eliminated the position of assistant manager, and Kerr's employment was terminated on June 17, 1974. On the following day he filed a claim for unemployment insurance benefits. The claim was denied because Kerr was then attending morning classes at Boise State University. Kerr appealed this decision within the Department of Employment and then to the Industrial Commission, both of which concluded that they were without authority to consider the constitutionality of I.C. Section 72-1312(a), and thus they applied the statute and denied Kerr's claim.

Although the provision in question, which gives differing treatment to persons attending night school and day school, is

found in the definition of a compensable week, it is an eligibility requirement for receiving unemployment insurance benefits, and thus, like all other statutory classifications, it must satisfy the equal protection requirements of the Fourteenth Amendment to the Constitution of the United States. The standard which must be applied to determine this question is well known and of long standing:

> "'[T]he Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. *Barbier v. Connolly,* 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923 (1885); *Lindsley v. Natural Carbonic Gas Co.,* 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911); *Railway Express Agency v. New York,* 336 U.S. a06, 69 S.Ct. 463, 93 L.Ed. 533 (1949); *McDonald v. Board of Election Commissioners,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969). The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* 253 U.S. 412, 415, 40 S.Ct. 560, 64 L.Ed. 989 (1920).' " *Eisenstadt v. Baird,* 405 U.S. 438, 446-447, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349 (1972).

[1, 2] In the area of social welfare legislation, if a classification has not been drawn upon traditionally suspect lines such as race, religion, sex, etc., the Supreme Court of the United States has held that the classification does not offend the due process clause of the Fourteenth Amendment of the Constitution of the United States if the classification bears a rational or reasonable relation to the purposes for which the statute was enacted. *Dandridge v. Williams,* 397 U.S. 471, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970); *McGowan v. Maryland,* 366

U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). However, if the purpose of the statutory classification in question is, as the Department of Employment argues, to protect the integrity of the unemployment insurance fund by making ineligible for unemployment insurance benefits persons who are primarily students and secondarily members of the labor force, this purpose cannot be effectuated by arbitrarily deeming night students to be part time students and day students to be full time students regardless of the hours worked or the time spent in school. As the facts in this case amply demonstrate, there are types of employment in which people normally work full time during the afternoon and evening hours and have their morning hours free. The record discloses that the claimant here was working substantially more than 40 hours a week long before he ever commenced taking morning classes. The Fourteenth Amendment of the Constitution of the United States prohibits the state from denying such a regularly employed person unemployment insurance benefits because he has decided to attend school during his non-working hours in the morning, when persons who work a normal daytime shift are not denied benefits because they have chosen to attend school during their free time at night. Thus, the distinction drawn by I.C. Section 72-1312(a) violates the Fourteenth Amendment and the Industrial Commission's conclusions of law denying Kerr benefits upon the authority of I.C. Section 72-1312(a) are in error.

[3] The order of the Industrial Commission is reversed, and the cause remanded with directions to award claimant Kerr unemployment insurance benefits and reasonable attorney fees for the entire proceedings as authorized in the regulations of the Idaho Department of Employment.

Reversed and remanded. Costs to appellant.

McQUADE, C. J., and McFADDEN, DONALDSON and SHEPARD, JJ., concur.

APPENDIX III

OLIVER W. SWANSON, Claimant-Respondent,
v.
EMPLOYMENT SECURITY AGENCY,
Defendant-Appellant.

342 P.2d 714 (1959)

Supreme Court of Idaho
July 15, 1959

Action for employment security benefits. The Industrial Accident Board rendered ruling in favor of claimant, and Employment Security Agency appealed. The Supreme Court, Smith, J., held that statute to effect that no person shall be deemed to be unemployed and eligible for unemployment benefits while he is attending a regular established school is clear and unambiguous, the term shall be deemed means that no person shall be adjudged to be or shall be regarded as unemployed while attending regular established school, statute creates a conclusive presumption that those attending a regular established school shall not be regarded as unemployed and shall be ineligible to receive unemployment security benefits, and man who became unemployed in January while working night shift and who attended regular established school in day time was not entitled to such benefits.

Determination of Industrial Accident Board reversed.

Social Security and Public Welfare [Key 410]

Statute to effect that no person shall be deemed to be unemployed and eligible for unemployment benefits while he is attending a regular established school is clear and unambiguous, the term "shall be deemed" means that no person shall be adjudged to be or shall be regarded as unemployed while attending regular established school, statute creates a conclusive presumption that those attending a regular established school shall not be regarded as unemployed and shall be ineligible to receive unemployment security benefits, and man who became unemployed in Janaury while working night shift and who

attended regular established school in daytime was not entitled to such benefits. I.C. Section 72-1312(a).

See Publication Words and Phrases, for other judicial constructions and definitions of "Shall be Deemed."

Frank L. Benson, Atty. Gen., John W. Gunn, Asst. Atty. Gen. (Graydon W. Smith, former Att. Gen., on the brief), for appellant.

Carver, McClenahan & Greenfield, Boise, for respondent.

SMITH, Justice.

Appellant Employment Security Agency will be referred to as the agency, respondent Oliver W. Swanson as claimant and the Industrial Accident Board as the board.

Claimant commenced this proceeding to determine whether he was eligible for employment security benefits while attending North Idaho Junior College in Coeur d'Alene, a regular established school. The relevant facts found by the agency's appeals examiner, adopted by the board on review, read as follows:

> "Claimant filed an initial claim for benefits effective January 5, 1958. He had been employed at the Northwest Timber Company from November, 1955, through January 8, 1958, and was unemployed because of reduction in force.
>
> "During the time that claimant was employed at Northwest Timber he was working night shift from 4:45 p.m. to 1:30 a.m. Starting with the second semester in January, 1956 (probably an error for 1957 – Document 2 in Agency's Administrative file), he enrolled at the North Idaho Junior College, majoring in education. His classes ran from 8 a.m. to 2:25 p.m. When the first semester ended on January 24, 2958 (although he did not take his examinations until January 29), claimant did not immediately enroll but after surveying the labor market

> and finding that there were few if any jobs existing, he enrolled as of February 17. At the time of the hearing [March 3, 1958] he was pursuing his course at the college.
>
> * * * * * * *
>
> "The claimant, after completing the first semester, made an effort to find other work but, not being successful in this, he again enrolled; and at the time of his hearing [before the appeals examiner], he was a full] time student at the junior college. He was also a full-time student between the time of his being laid off and until after taking his examinations for the semester."

The facts are not in dispute.

I.C. Section 72-1312(a), the particular statute involved, reads as follows:

> "A week of unemployment with respect to which an eligible benefit claimant shall be entitled to benefits shall be known as a compensable week; provided, however, that *no person shall be deemed to be unemployed while he is attending a regular established school* excluding night school." (Emphasis supplied.)

The matter for decision by the board on review was whether claimant was eligible for benefits beginning January 8, through the week ending February 1, 1958, and during times thereafter, while attending the college. Based upon the facts as outlined and the statute as applied to those facts the board determined that claimant should be allowed benefits. The agency appealed from the board's determination.

The single question of law involved pin-points on the interpretation of the portion of I.C. Section 72-1312(a), "no person shall be deemed to be unemployed while he is attending a regular established school excluding night school." The board, holding in favor of claimant, ruled that the phrase, "no person shall be deemed to be unemployed," creates a prima facie but rebuttable presumption of ineligibility for benefits, and that

claimant had successfully rebutted the presumption, thus entitling him to benefits. The agency asserts such ruling as error.

The words "deem" or "deemed" have been the subject of considerable controversy and in instances have received the interpretation that they create a disputable presumption and not a conclusive one. Cases in this category are: *Kleppe v. Odin Tp., McHenry County,* 40 N.D. 595, 169 N.W. 313; *Moody v. State,* 159 Tenn. 245, 17 S.W.2d 919; *Sanitary Milk & Ice Cream Co. v. Hickman,* 119 W.Va. 351, 193 S.E. 553; *Zimmerman v. Zimmerman,* 175 Or. 582, 155 P.2d 293; *Erickson v. Erickson,* 167 Or. 1, 115 P.2d 172; *Williamson v. Winningham,* 199 Okl. 393, 186 P.2d 644; *Brimm v. Cache Valley Banking Co.,* 2 Utah 2d 93, 269 P.2d 859.

Conversely, many well reasoned decisions indicate the weight of authority to be that the words "deem" or "deemed" create a conclusive presumption. We refer to a few of those decisions.

In the early case of *Leonard v. Grant,* C.C.D.Or., 5 F 11, 16, was involved a federal law (19 Stat. 604) which provided that a woman, capable of naturalization, who was now or may hereafter be married to a citizen of the United States, shall be deemed a United States citizen. The Court, in construing the statute as creating a conclusive presumption, i.e., the equivalent to her being naturalized directly by an act of Congress or in the usual mode thereby prescribed, said: "The word 'deemed' is the equivalent of 'considered' or 'judged;' and, therefore, whatever an act of congress requires to be 'deemed' or 'taken' as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly."

In *Harder v. Irwin,* D.C.N.Y., 285 F. 402, 405, was interpreted a provision of the Revenue Act of 1916, Section 31(b), as amended by Act October 3, 1917, 40 Stat. 300 (Comp. St. Section 6336z), that any distribution made to corporation shareholders "shall be deemed to have been made from the most recently accumulated undivided profits or

surplus." The Court held that the word "deemed" must be construed as an absolute requirement or as creating a conclusive presumption. See *United States v. Davis,* D.C. Mo., 50 F.2d 903, to the same effect.

H. P. Coffee Co. v. Reconstruction Finance Corp., Emp. App., 215 F.2d 818, 822, involved the interpretation of a Federal regulation, that coffee subsidy payments shall be deemed to have been paid on all coffee the importer had in inventory on termination of the program. The Court, in holding that "deemed" created a conclusive presumption of payment of the subsidy, said:

> "It is said that the word [deemed] must be construed as raising only a rebuttable presumption that the subsidy had been paid on all coffee which an importer has in his terminal inventory, and that this presumption disappears on proof by an importer that, in fact, he has received no subsidy payments thereon. This contention flies directly into the teeth of the generally accepted definitive import of the word 'deemed' and almost unanimous judicial determination that the word, when employed in statutory law, creates a conclusive presumption. E.g., *United States v. Davis,* D.C., 50 F.2d 903; *Harder v. Irwin,* D.C., 285 F. 402; *Intagliata v. Shipowners & Merchants Towboat Co.,* Cal.App., 151 P.2d 133, subsequent opinion 26 Cal.2d 365, 159 P.2d 1; *King v. McElroy,* 37 N.M. 238, 21 P.2d 80; *Commonwealth v. Pratt,* 132 Mass 246. See 11 Words and Phrases, Deem, pp.478-482. Absent qualifying language, or ambiguity, we must give to the word 'deemed,' as employed in the emphasized language of paragraph 1(f)(iii), its natural import."

In *In re Waldron's Estate,* 84 Colo. 1, 267 P. 191, the Court held that the word "deem" created a conclusive presumption as to residence, as used in a statute providing that in the case of a person dwelling in the state for the greater part of any period, he shall be deemed a resident during the twelve consecutive months in the twenty-four months next preceding his death, for the purpose of determining inheritance taxes.

In *State v. Holmes,* 133 Wash. 543, 234 P. 275, the Court held that a law created a conclusive presumption, which provided that an attorney who failed to register annually and pay a registration fee, "shall be deemed" suspended.

In 26 A C.J.S., p. 122, definitions of the word "deemed," taken from many jurisdictions, appear as follows:

> "Following the definitions given for the present tense and, of course, depending upon the connection or circumstances of its use 'deemed' has been variously defined as meaning accounted, adjudged, conclusively considered, considered, declared, decreed, determined, judged, or presumed; accepted as an established fact; construed or interpreted, held, regarded or treated as; taken and considered. 'Deemed' is further defined as meaning conclusively presumed, as distinguished from presumed prima facie; although it has also been held that sometimes the word may connote a prima facie presumption as distinguished from a conclusive presumption.
>
> " 'Deemed' has been held to be equivalent to, or, synonymous with, 'adjudged,' 'considered,' and 'decreed,' and also with 'determined,' 'presumed,' and 'regarded.' "

The text cites the jurisdictions of North Dakota and Virginia wherein the word has been held connoting a prima facie presumption as distinguished from conclusive presumption.

In our own jurisdiction we find one instance, in *Powell v. Spackman,* 7 Idaho 692, 65 P. 503, 54 L.R.A. 378, wherein was construed the word "deem;" therein this Court, in construing the portion of Idaho Const. art. 6, Section 5, reading:

"For the purpose of voting no person shall be deemed to have gained or lost a residence by reason of his presence or absence * * * [then follows certain contingencies]."

voted as follows:

> "The word 'deemed' is the past participle of the transitive verb 'deem,' which is defined by Webster as follows: 'To account; to esteem; to think; to judge; to hold in opinion; to regard.' And it is defined by the same lexicographer, when used as an intransitive verb, as follows: 'To be of opinion; to think; to estimate.' Giving this word its ordinary signification as generally used, it would read in the provision in question thus: 'No person shall be accounted, or no person shall be esteemed, or no person shall be thought to be, or no person shall be judged to be, or no person shall be held in opinion to be, or no person shall be regarded to have gained or lost a residence by reason of his presence or absence at an asylum kept at the public expense, for the purpose of voting."

The Court thus construed the presumption of such constitutional provision as conclusive in that it preserved the voting status of an inmate of the Soldiers' Home at the time of his entry therein, and that the inmate could not, by reason of his mere presence in the Home, acquire a voting right in the county and precinct in which the institution is situate. The Court concluded, "That construction gives force and effect to the language of the provision, and has due regard for the common meaning of the words employed."

This Court has interpreted "shall" as having a mandatory meaning. In *Munroe v. Sullivan Mining Co.,* 69 Idaho 348, 207 P.2d 547, the word received such an interpretation as used in I.C. Section 72-1227, which provides that the Industrial Accident Board "shall" select a medical panel in a silicosis case from members of a silicosis panel; and in *Miller v. Brinkman,* 48 Idaho 232, 281 P. 372, this Court attributed a mandatory meaning to the word, as used in C.S. Section 6726 [now I.C. Section 5-905], setting forth conditions under which the court "shall" set aside a judgment. See also *Hollingsworth v. Koelsch,* 76 Idaho 203, 280 P.2d 415; *Pierce v. Vialpando,* 78 Idaho 274, 301 P.2d 1099.

We now seek the meaning of the phrase "shall be deemed."

In *Central Surety & Insurance Corporation v. Marro*, 189 Misc. 823, 71 N.Y.S.2d 815, 817, was construed a statute [N.Y. Insurance Law, Section 121] providing that an insurer delivering a contract of insurance to a broker shall be deemed to have authorized the broker to receive premiums due on insurer's behalf or to become due not more than ninety days thereafter. The Court held that the phrase, "shall be deemed" created a conclusive presumption of authority of the broker to receive payments belonging to the insurer.

In *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 85 Cal. 80, 24 P. 648, the Court construed the phrase, "shall be deemed equivalent to completion," meant in legal effect equal to completion; that is, "for the purpose of filing a lien [shall be treated] as an actual completion," – a conclusive presumption.

In *Irwin v. Pickwick Stages System*, 134 Cal.App. 443, 25 P.2d 998, 1000, the Court held that the phrase "shall be deemed," created a conclusive presumption as used in a statute providing that title to a vehicle shall not be deemed to have passed from a legal owner to another until new certificates of registration and ownership are issued.

In *Dilworth v. Schuylkill Imp. Land Co. of Philadelphia*, 219 Pa. 527, 69 A. 47, 48, the Court held that expressions, "shall be construed" and "shall be deemed," had been used time out of mind in statutes to import the same as "shall mean."

The cases are few which construe statutes similar in import to our statute, I.C. Section 72-1312(a). We shall review the few cases we have been able to find.

In *Wyka v. Colt's Patent Fire Arms Mfg. Co.*, 129 Conn. 71, 26 A.2d 465, claimant left employment to attend a school. The statute provided that an individual should not be eligible for benefits if the administrator found that he had left employment to attend school as a regularly enrolled student. The Court ruled that one who had left employment to become a regularly enrolled student at a university, could only become

eligible for benefits upon completing the course of study and again registering for work.

In *Cornell v. Dalpiaz*, Ohio App., 128 N.E.2d 132, 133, was interpreted a statute which precluded students attending an established educational institution, from receiving unemployment benefits. The applicant for benefits was shown as enrolled in and attending a refrigeration course in a trade school established by the Veterans Administration which, the Court held, was not "an established educational institution" and consequently that the applicant was eligible for benefits because the Ohio legislature in enacting the statute, did not have in contemplation the kind of trade school which the applicant was attending, and because he was able to and available for work during his attendance in the trade school.

In *Cornell v. Schroeder*, 94 Ohio App. 75, 114 N.E.2d 595, 597, under the statute which precluded a payment of benefits to a person leaving his most recent work to attend an established educational institution, the Court, in denying benefits to an applicant while attending business school during her period of unemployment, ruled: "Claimant's enrollment in the business school inevitably affected her freedom of effort to find suitable employment, reflecting adversely on whether of not she was reasonably available for work under the statute," and upon ruling that the statute was certain, definite and unambiguous, stated: "the court cannot judicially amend the law nor change its meaning when that statute is susceptible of only one interpretation."

In *Acierno v. General Fireproofing Co.*, 166 Ohio St. 538, 144 N.E.2d 201, the Ohio Court held that "regularly attending" an established educational institution connotes attendance therein as would normally be required to complete the prescribed course for graduation on customary and usual schedules of the institution. There is no such limitation in I.C. Section 72-1312(a), since our statute merely provides that no person "attending" a regular established school shall be deemed to be unemployed.

Again returning to our own jurisdiction wherein this Court, in *Powell v. Spackman*, supra, has interpreted the word "deem" as creating a conclusive presumption, the connotation of I.C. Section 72-1312(a) is that no person shall be [illegible]ted, or esteemed, or thought to be, or judged to be, or held in opinion to be, or shall be regarded as unemployed while attending a regular established school excluding night school.

The statute is clear and unambiguous. The intent of the legislature to create the conclusive presumption that those attending a regular established school shall not be regarded as unemployed and shall be ineligible to receive employment security benefits is clearly indicated. This Court cannot judicially amend I.C. Section 72-1312(a), nor change its meaning when it is susceptible only of the one interpretation.

The determination of the Industrial Accident Board is reversed.

No costs allowed.

PORTER, C. J., and TAYLOR, KNUDSEN and McQUADE, JJ., concur.

APPENDIX IV

DECISION OF APPEALS EXAMINER

Marlene Smith, Claimant

ISSUE

To determine if the claimant was attending a regular established school.

STATUTORY PROVISIONS

Section 72-1312 of the Idaho Code in the definition of "compensable week" is is stated • • • provided, however, that no person shall be deemed to be unemployed while he is attending a regular established school excluding night school, • • • ."

FINDINGS OF FACT

Following the claimant's last regular employment, she was found eligible for unemployment insurance benefits on April 27, 1975. She continued receipt of said benefits until notifying the Department that she had enrolled in classes or a class at Boise State University on June 13, 1975. Her classes were from Monday through Friday from 7:00 a.m. to 9:00 a.m. She explained that it in no way affected her availability for full-time work. It is her opinion that inasmuch as there is no night school during the summer months, such as she attended during the fall and winter terms of school, that perhaps the law might be discriminatory with respect to the manner in which it is couched and resulting in her subsequent denial of benefits. She believes that some consideration should be given considering her hours of school and the hours that she is willing to work. She explained that her last regular employment began at something near 9:30 a.m. and proceeded throughout the day for an eight hour period.

CONCLUSIONS

The claimant's wish to receive benefits while attending school is understandable and not questioned. However, the

legislative action, as expressed in the statute, is clear and unambiguous that an individual "attending a regular established school" is not deemed unemployed.

The claimant in this instance, attended a class or classes of an academic nature in an established university during a regular session of school. That it is a regular established school is not questioned. Thus it must be seen that the claimant, while so enrolled, did not meet the requirements of the law during that time.

DECISION

Wherefore by reason of the foregoing Findings of Fact and Statutory Provisions it is hereby DETERMINED:

The redetermination of the Redeterminations Examiner denying benefits effective June 15, 1975, is affirmed.

This ineligibility will continue until such time the claimant is no longer enrolled in a regular established school and meets all other requirements of the Employment Security Law.

Dated at Boise, Idaho, on this 15th day of August, 1975.

/s/ G. H. Oram,
Senior Appeals Examiner for the
Department of Employment

APPENDIX V

In the Matter of

MARLENE G. SMITH, Claimant

vs.

DEPARTMENT OF EMPLOYMENT, Defendant.

The above entitled matter came before the Commission for hearing in Boise on November 13, 1974, with Commissioners Lawrence G. Sirhall, Will S. Defenbach and Gerald A. Geddes present. The claimant was present in person and testified in her own behalf. The Department of Employment was represented by Ray Malouf, Legal Counsel. Having considered the evidence, the Commission enters the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

I

The claimant's usual occupation has been as a clerk in department stores. The claimant has been determined to be ineligible for benefits by the Department of Employment for the reason that she was attending Boise State University during periods in 1975.

II

During the period from June 13 to July 11, 1975, the claimant attended class from 7 to 9 a.m. From July 14 to August 15, the claimant attended a class from 7 to 8:30 a.m. The classes were held five days a week.

III

The claimant normally commenced work at the time the department stores open at approximately 9:30 a.m. Her class attendance has not interfered with her employment in her usual occupation and, thus, has not affected her availability for full time work.

CONCLUSIONS OF LAW

I

Section 72-1312(a) Idaho Code provides that no person shall be deemed to be unemployed while he is attending a regular established school excluding night school. The claimant was found ineligible under this provision by a decision of the Appeals Examiner for the Department of Employment.

II

The Idaho Supreme Court has recently determined that this provision of the Employment Security Law violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States to the extent that it attempts to distinguish between day and night students in determining eligibility for unemployment insurance benefits. *Kerr v. Department of Employment,* Supreme Court No. 11854, February 3, 1976. The Commission, therefore, concludes that the claimant cannot be found ineligible under this provision, and the decision of the Appeals Examiner must be reversed.

ORDER

IT IS HEREBY ORDERED and this does order that the claimant is eligible for unemployment insurance benefits effective June 15, 1975. The decision of the Appeals Examiner is hereby reversed.

DATED and FILED this 9th day of February, 1976.

INDUSTRIAL COMMISSION